

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 63570-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
STEVEN M. MILLER,	)	UNPUBLISHED OPINION
	)	
<u>Appellant.</u>	)	FILED: April 26, 2010

Lau, J. — A motion to withdraw a guilty plea filed more than one year after a facially valid judgment and sentence becomes final is subject to the one-year time bar of RCW 10.73.090(1). Steven Miller's December 2008 motion to withdraw his guilty plea was filed more than a year after his February 17, 2006 judgment and sentence became final. The judgment and sentence is valid on its face. Miller was advised of the one-year time bar at the time of sentencing. We therefore vacate the superior court's denial of Miller's motion, dismiss the appeal, and convert the matter for consideration as a personal restraint petition (PRP), which is dismissed as untimely under the one-year time bar.

**FACTS**

On December 11, 2008, the Washington Supreme Court received Miller's motion

to withdraw his February 17, 2006 guilty plea. The motion was filed with the King County Superior Court on March 24, 2009. Miller's December 6, 2008 affidavit in support of his motion recites that he "was not in the right state of mind" when he entered his guilty plea and the trial judge asked if he was feeling okay. He also alleged that his attorney told him the attorney had an agreement with the prosecutor that any jail time would be served on house arrest and, if approved by a counselor, he could do a special sex offender sentencing alternative program. He also contends he did not know what the charges were and had no idea the statement he was giving was going to be used against him.

On March 24, 2009, the trial court entered an order denying the motion to withdraw the guilty plea; the judge dated his signature March 19, 2009. On April 15, 2009, Miller mailed his notice of appeal of the "motion to withdraw guilty plea pursuant to CrR 7.8" to King County Superior Court.

In a letter dated May 1, 2009, the trial court indicated that it had received Miller's "letter/motion requesting to withdraw your guilty plea." The court noted that Miller's prior request to withdraw his plea had been denied on March 19, 2009. The letter concluded that the motion was being transferred to the Court of Appeals. On May 13, 2009, the trial court entered an order transferring this letter/motion to this court under CrR 7.8(c)(2) for consideration as a personal restraint petition. A commissioner of this court ruled that this matter would be treated as an appeal of the March 19, 2009 order denying the motion to withdraw the guilty plea.

#### ANALYSIS

Miller argues that he was not adequately advised of a direct consequence of his guilty plea and therefore the trial court abused its discretion by denying his motion to withdraw his guilty plea. The State responds that the motion was a collateral attack time barred under RCW 10.73.090. The State contends that whether or not he was misadvised about the consequences of his plea, his motion was untimely and this court should convert the appeal to a personal restraint petition and dismiss the petition. We agree.

RCW 10.73.090(1) provides, “No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.” A “collateral attack” includes a motion to withdraw a guilty plea.RCW 10.73.090(2). Our Supreme Court has explained that RCW 10.73.090 is a “mandatory rule that acts as a bar to appellate court consideration of PRPs filed after the limitation period has passed, unless the petitioner demonstrates that the petition is based on one of the exemptions enumerated in RCW 10.73.100.” In re Pers. Restraint of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008).

Miller’s judgment and sentence became final when it was entered on February 17, 2006. Miller offers no argument that the judgment and sentence is invalid on its face. The “facial invalidity” inquiry is directed to the judgment and sentence itself.<sup>1</sup> Misinformation about the consequences of the plea is not in itself a facial

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<sup>1</sup> “Invalid on its face” means the judgment and sentence evidences the invalidity without further elaboration. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

defect. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002).

The judgment was entered by a court of competent jurisdiction, and none of the statutory exemptions applies.

In 2007, CrR 7.8(c)(2) was amended to require the following procedure:

The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

Under the amended rule, the superior court can no longer dismiss a CrR 7.8 motion as clearly lacking merit. Cf. State v. Smith, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

Rather, the court must transfer the motion to the Court of Appeals for consideration as a PRP. Smith, 144 Wn. App. at 863. Miller's December 2008 motion should have been transferred to this court.

The State requests that, in the interests of judicial economy, this court convert this matter to a PRP and dismiss the petition under the one-year time bar. The State acknowledges that in Smith, a Division Two panel of this court declined to proceed in this fashion in somewhat similar circumstances. We agree with the State that Smith's holding is properly distinguished here.

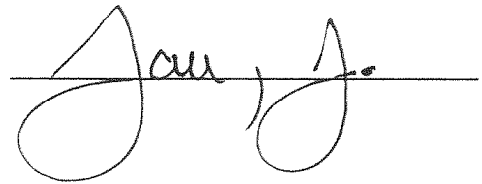
In Smith, the superior court erroneously denied the defendant's CrR 7.8(c) motion as time barred under RCW 10.73.090. Smith, 144 Wn. App. at 863–64. The reviewing court declined the State's request to convert the notice of appeal to a PRP, reasoning that such a conversion could “infringe on [the defendant's] right to choose

whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule in RCW 10.73.140 as a result of our conversion of the motion.” Smith, 144 Wn. App. at 864. Therefore, the court remanded the case for an order complying with CrR 7.8(c). Smith, 144 Wn. App. at 864.

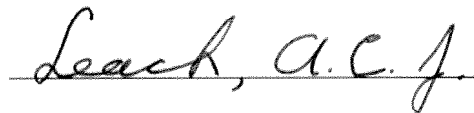
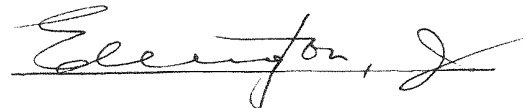
The concerns expressed in Smith are not present in this case. Here, Miller explicitly sought review in this court and has not asked that his motion be withdrawn. A remand to the trial court to transfer this matter back to this court for a determination whether the PRP is time barred would serve no purpose. We agree with the State that the appropriate remedy here is to convert the matter for consideration as a PRP.

Miller argues that he was not advised of his right to appeal the circumstances under which his guilty plea was taken. The trial court crossed out the right to appeal provisions of the written notice of rights on appeal and rights pursuant to RCW 10.73. But the trial court advised Miller of the one-year time bar on his right to collaterally attack his conviction. Miller provides no compelling authority for the proposition that any inaccuracy in advice of his right to appeal impacts the time within which he may file a motion to withdraw his guilty plea. He argues that equitable tolling should apply, relying on State v. Littlefair, 112 Wn. App. 749, 51 P.3d 116 (2002), where the defendant did not learn of deportation consequences until after sentencing. But in In re Personal Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008), our Supreme Court expressly questioned the holding in Littlefair and noted that equitable tolling applies in very limited settings. “[E]quitable tolling is allowed when justice requires and when the predicates for equitable tolling are met. The predicates we identified there

were bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. We agree that these same factors apply in the criminal context.” Bonds, 165 Wn.2d at 141. Miller does not establish bad faith, deception or false assurances, and he offers no showing that he exercised diligence by waiting until almost two years after his judgment and sentence were entered to file his motion to withdraw his guilty plea. Equitable tolling has no application here. Miller’s arguments that he received ineffective assistance of counsel when he entered his guilty plea and was sentenced do not create any exception to the one-year time bar. We agree with the State that the one-year time bar applies; therefore, the PRP is dismissed as untimely.<sup>2</sup>

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WE CONCUR:

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<sup>2</sup> Regarding the trial court’s May 5, 2009 order transferring Miller’s letter/motion to withdraw his guilty plea to this court for consideration as a personal restraint petition, Miller has not included the letter/motion as part of the record or pursued any arguments related to that matter. In the absence of any argument by Miller that the letter/motion presents any issues separate and apart from his December 2008 motion to withdraw his guilty plea, we also dismiss that transferred matter.